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No. 79-86

In the Supreme Court of the United States

OCTOBER TERM, 1978

AMY T. CRITZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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Washington, D.C. 20530

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The sole question presented in this federal income tax case is whether petitioner's income from various businesses is exempt because the businesses were physically located on Indian reservation land purported to be exempt from tax.[1] During the taxable years at issue, petitioner owned and operated a restaurant, motel and gift shop, and was the owner-lessor of other buildings. The improvements, in which petitioner invested an amount exceeding $383,000, were located on land that petitioner claimed to be tax-exempt reservation lands. (Pet. App. B-2 to B-4). In this refund suit, the Court of

[1]Petitioner's properties were "possessory holdings" (Pet. App. B-3 to B-4), which are distinguishable from the "restricted allotments and undivided property" which enjoy exemption under Section 21 of the Act of June 4, 1924, ch. 253, 43 Stat. 376, 381, (noted under 25 U.S.C. 331). But even on the assumption that petitioner's properties were exempt, the result in this case would be the same because the ground of the Court of Claims' decision was premised on its factual conclusion that petitioner's income was not "directly derived" from this land.

Claims held that even if the land in question was exempt from tax, under this Court's decision in *Squire* v. *Capoeman*, 351 U.S. 1, 9 (1956), petitioner's income from her various businesses was taxable because it "was not derived directly from the land, but rather emanated primarily from taxpayer's substantial investment in her improvements and her business activities related to those assets" (Pet. App. B-13).

1. The decision below correctly held that petitioner's income from her restaurant, motel and gift shop businesses was subject to income tax. Indians, like all other citizens, are subject to federal income taxation unless exempt by statute or treaty. *Superintendent* v. *Commissioner*, 295 U.S. 418, 421 (1935). The treaties pertinent to petitioner's claim are typical of those under which the government agrees to hold title to reservation land in trust for the members of a tribe and which confer certain tax exemptions relating to the lands.[2]

Under this Court's decision in *Squire* v. *Capoeman*, *supra*, 351 U.S. at 9, " 'It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom,' " quoting from F. Cohen, *Handbook of Federal Indian Law* 265 (1941). Whether income is directly derived from land or from some other source is essentially a question of fact. Where the income derives from the production, severance, or extraction of the land's natural resources, the land is the fundamental and direct source of income so that the income is exempt. See, *e.g.*, *Squire* v. *Capoeman*, *supra* (sale of timber); *Big Eagle* v. *United States*, 300 F. 2d 765

[2]See Act of February 8, 1887, ch. 119, 24 Stat. 388 (25 U.S.C. 331 *et seq.*), commonly called the General Allotment Act, and the Act of June 4, 1924, ch. 253, 43 Stat. 376, with respect to the Eastern Cherokee Reservation.

(Ct. Cl. 1962) (production of minerals); *Stevens* v. *Commissioner*, 452 F. 2d 741 (9th Cir. 1971) (farming and grazing).[3] On the other hand, the courts have repeatedly held that the exemption is not available simply because in some indirect or minor way the income is related to tax-exempt land. See, *e.g.*, *Commissioner* v. *Walker*, 326 F. 2d 261 (9th Cir. 1964) (tribal official's salary paid out of revenues derived from land); *Fry* v. *United States*, 557 F. 2d 646 (9th Cir. 1977) (payments to Indian logger who worked on reservation land); *Beams* v. *United States*, 294 F. Supp. 1218 (E.D. Okla. 1968), aff'd *per curiam*, 417 F. 2d 197 (10th Cir. 1969) (income derived from the reinvestment of royalties).

Here, the record amply supports the Court of Claims' finding that the primary source of petitioner's income was not the land, but her sizeable investment in the improvements which she owned outright and the personal services rendered in connection with the operation of those assets. It therefore correctly rejected (Pet. App. B-10, B-11, B-14, B-15) petitioner's claim to exemption simply because her businesses were located on allegdly tax-exempt land.[4]

[3]*United States* v. *Rickert*, 188 U.S. 432 (1903), and *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), which petitioner cites (Pet. 16-18) as conflicting with the decision below, are not to the contrary. Those cases involved the authority of state and local governments to impose property taxes on the holdings of Indians. As the Court of Claims correctly observed, the question whether realty owned by Indians can be subject to state and local property tax has no bearing on the question whether the federal government can tax the income from such land under the "directly derived" test of *Squire* v. *Capoeman*, *supra* (Pet. App. B 13 to B-15).

[4]In *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 174-178 (1973), the Court held that where the federal government establishes an Indian reservation the state has no power to tax resident Indians or their property unless such authority is expressly conferred by an Act of Congress. The federal government, however,

2. Petitioner further argues (Pet. 9-12) that the imposition of the tax on the income from her businesses is incompatible with various programs and policies that the government has adopted to promote the economic development of Indians. Specifically, she urges (Pet. 11) that the tax exemption of income from tax-exempt Indian land should not be limited to " 'raw' versus modern uses of trust land" and that petitioner's income from her businesses should be exempt because it reflects the (Pet. 12) "use of the natural, intrinsic attributes of her land * * *." But the fact that petitioner's land was surrounded by attractive scenery did not directly link petitioner's restaurant, motel, or gift shop businesses to any natural, intrinsic attribute of her land; it merely enhanced her income from her businesses, which did not reflect any direct use of the land. The land served solely as the physical location upon which petitioner's commercial building investment stood.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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has the right to tax Indians on a reservation unless such persons and their property are specifically exempted by statute or treaty. *Superintendent* v. *Commissioner, supra.* In *Mescalero,* the Court barred the imposition of a state tax calculated on the value of personal property permanently affixed to tax-exempt land, but it ruled that the state could collect a gross income tax assessed on revenues generated by the use of such tax-exempt property.

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